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No. 92-928

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN H. MEYER, CROSS-PETITIONER

v.

ROBERT PATTULLO

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Cross-petitioner is a former official of an insolvent thrift whose employment was terminated by the FSLIC when it was appointed receiver. The question presented is whether the court of appeals erred in holding that the individual FSLIC official responsible for terminating cross-petitioner's employment is immune from liability in this *Bivens* action under the doctrine of qualified immunity.

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OPINION BELOW

The decision of the court of appeals (Cross-Pet. App. 1a-32a) is reported at 944 F.2d 562.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1991. A petition for rehearing was denied on June 29, 1992. On September 22, 1992, Justice O'Connor extended the time within which the Solicitor General could file a petition for a writ of certiorari to and including October 27, 1992. The Solicitor General filed a petition for a writ of certiorari on October 27, 1992. The cross-petition for a writ of certiorari was filed on November 30, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 13, 1982, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for Fidelity Savings and Loan, an insolvent state-chartered savings and loan institution. FSLIC designated cross-respondent, Robert Pattullo, as its special representative with responsibility for the receivership. Pattullo proceeded to terminate the employment of four of Fidelity's top management officials, including cross-petitioner, John H. Meyer, an executive vice-president. The discharged employees were not afforded a hearing or any opportunity to contest their termination. See Cross-Pet. App. 2a-3a.

2. Cross-petitioner subsequently brought this action for damages against FSLIC and Pattullo. Invoking *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), cross-petitioner alleged that the termination of his employment deprived him of a state-created property interest in continued employment without due process of law, in violation of the Fifth Amendment to the United States Constitution. The matter proceeded to trial before a jury.

In a special verdict, the jury found that FSLIC violated cross-petitioner's constitutional rights, but that Pattullo was immune from liability under the doctrine of qualified immunity. The district court entered judgment for cross-petitioner in the amount of $130,000 against FSLIC. The court also entered judgment for Pattullo on cross-petitioner's claim against him. See Pet. App. 3a-4a.

The court of appeals affirmed. The court upheld the district court's conclusions that FSLIC was subject to suit under a *Bivens* theory and that Meyer's constitutional rights were violated. Pet. App. 4a-27a. The Solicitor General, on behalf of the Federal Deposit Insurance Corporation (FDIC), FSLIC's statutory successor, has filed a petition for a writ of certiorari seeking review of those rulings. *Federal Deposit Ins. Corp.* v. *Meyer*, No. 92-741 (filed Oct. 27, 1992).

The court of appeals also upheld the district court's judgment in favor of Pattullo on qualified immunity grounds. Cross-Pet. App. 27a-32a. The court agreed with both parties that the jury, which had found Pattullo not liable, has been improperly instructed concerning the defense of qualified immunity. Cross-Pet. 28a-29a. The court nevertheless held that the error was not reversible because Pattullo had established that, "as a matter of law, the facts alleged . . . [do not] support a claim of violation of clearly established law." Cross-Pet. App. 30a (internal quotation marks omitted). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The court observed that "[r]ules governing federally insured institutions and federal receivership make for treacherous law," Cross-Pet. App. 31a, and that "a federal employee could reasonably have believed in the lawfulness of the actions at issue." *Id.* at 30a n.22. Accordingly, the court affirmed the judgment in favor of Pattullo.

ARGUMENT

Cross-petitioner contends that the court of appeals erred in rejecting his claim that the facts of this case make out a violation of clearly established law. Cross-petitioner also claims that the question whether a reasonable person in Pattullo's position would have known that his actions violated clearly established law should have been submitted to the jury. Because the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals, further review is unwarranted.

1. "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson* v. *Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). Thus, qualified immunity is required unless the illegality of the defendant's actions was "apparent" under "pre-existing law." *Anderson*, 483 U.S. at 640; accord *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

As we explain in our petition (92-741 Pet. 20-25), cross-petitioner did not have a protected property interest in continued employment once his employer was placed in federal receivership and, even if he did, the receivership claims process afforded him all the process that would be due. Even if FDIC does not ultimately prevail on its legal interpretation, however, its arguments at least demonstrate that the right asserted by cross-petitioner was not clearly established at the time the receiver terminated his employment. As the court of appeals stated, in light

of the "complex" and "treacherous" nature of the rules governing banking receiverships, Cross-Pet. App. 31a, Pattullo could not have known that summary dismissal of cross-petitioner violated any clearly established constitutional norm.

Moreover, the question whether the particular right asserted by cross-petitioner was clearly established at the time he was dismissed does not require resolution by this Court because no court of appeals has found a clearly established due process right in this context. Further review of this issue is accordingly not warranted.

2. Cross-petitioner further contends that the court of appeals erred in deciding that Pattullo was entitled to qualified immunity, rather than remanding to the district court for a new trial so that a jury could decide that question. Cross-Pet. 14-17. He concedes that "[t]he contours of pre-existing law is appropriately a question of law for the court." Cross-Pet. 16.[1] He contends, however, that the court of appeals did not decide this case on the basis of an analysis of "the law relating to employment rights and their status as constitutionally-protected property," *ibid.*, but instead decided it on the basis of "the objective reasonableness of Pattullo's conduct." *Id.* at 17.

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[1] In the district court, cross-petitioner sought to present expert testimony on the state of the law in 1982. The district court declined to allow such evidence to be presented. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."). Cross-petitioner challenged that ruling on appeal, but has not renewed the contention in this Court. See Pet. App. 32a.

In his view, the latter issue was one for the jury, not for the court.

The court of appeals properly decided that it was unnecessary to remand this case for a new trial, because Pattullo was protected by qualified immunity as a matter of law. The court based that decision on its determination that the law governing Pattullo's termination of cross-petitioner's employment was notably *un*clear. Although the court of appeals (erroneously, in our view) ultimately decided that cross-petitioner's rights had been violated, the court reached that conclusion only after finding that the arguments advanced by FDIC and Pattullo to the contrary were "seductive," Cross-Pet. App. 23a, and "appealing," Cross-Pet. App. 25a. Moreover, as the court of appeals noted, the district court too had had substantial difficulty in resolving the same issue, having reversed its position on the question whether cross-petitioner had any legitimate expectation of continued employment. See Cross-Pet. App. 31a. Thus, the court of appeals concluded, "[i]n light of the complex nature of [cross-petitioner's] entitlement, reflected in both the district court's and our own examination of the issue, we are unable to say that" it was clearly established that summary dismissal of cross-petitioner was unlawful. Cross-Pet. App. 31a.

Having determined that the law governing this case was not clearly established, the court of appeals properly decided that there was no issue left to be litigated before a jury at a new trial. Cross-petitioner contends that "[h]ad the jury been properly instructed on the parameters of clearly established law, it would have then been asked whether a reasonable official would have known his conduct violated that law." Cross-Pet.

17. A jury instructed in accordance with the court of appeals' legal analysis in this case, however, would have been instructed that the rights of an employee of a banking institution in federal receivership against summary dismissal were not clearly established. In light of that instruction, the jury would have had to conclude, in cross-petitioner's words, that "a reasonable official would" *not* "have known that his conduct violated the law." Accordingly, there remained no question concerning "the objective reasonableness of Pattullo's conduct," Cross-Pet. 17, for a jury to decide, and the court of appeals properly determined that Pattullo was protected by qualified immunity.

Cross-petitioner argues (Cross-Pet. 15-16) that the courts of appeals are not in complete agreement as to the respective roles of court and jury in deciding qualified immunity cases. But we are aware of no authority for the proposition that where, as here, the right claimed by the plaintiff was not clearly established, the case must nonetheless be submitted to the jury.[2] Thus, to the extent that the courts of appeals differ as to whether certain subsidiary factual questions in a qualified immunity case may be submitted

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[2] Cross-petitioner agrees that summary adjudication of a claim to qualified immunity is appropriate "in the majority of cases where the availability of qualified immunity is clear given the relevant facts." Cross-Pet. 14 n.5. Remarkably, however, he asserts that "where, as here, the government official acts in a more complex legal environment, summary adjudication is not appropriate." *Ibid.* In our view, it is precisely in such circumstances that officials should not be subject to suits for damages for their failure to "entangl[e] themselves in the vagaries of" predicting how a court (or jury) would decide highly complex legal questions. *Anderson* v. *Creighton*, 483 U.S. at 646.

to the jury, any such conflict among the circuits is not presented here. Especially in light of this Court's repeated admonitions that it is wrong to "routinely place[] the question of immunity in the hands of the jury," *Hunter* v. *Bryant*, 112 S. Ct. 534, 537 (1991) (per curiam), and that the qualified immunity issue "should be resolved at the earliest possible stage of a litigation," *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987),[3] the court of appeals properly determined that a new trial to determine Pattullo's entitlement to qualified immunity was unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Accord *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986); *Cleavinger* v. *Saxner*, 474 U.S. 193, 208 (1985); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

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